1990

Deanna Foxley v. William N. Foxley : Petition for Writ of Certiorari

Utah Supreme Court

Robert W. Hughes; Attorney for Respondent.
Greg S. Ericksen; Attorney for Petitioner.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT

STATE OF UTAH

* * * * * * * * *

DEANNA FOXLEY, Plaintiff-Respondent, v. WILLIAM N. FOXLEY, Defendant-Petitioner.	)	PETITION FOR WRIT OF CERTIORARI Case No. 900590

* * * * * * * * *

PETITION FOR REVIEW FROM A DECISION AND JUDGMENT
OF THE UTAH COURT OF APPEALS

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IN THE SUPREME COURT

STATE OF UTAH

* * * * * * * * *

DEANNA FOXLEY,	)	
	)	PETITION FOR WRIT
Plaintiff-Respondent,	)	OF CERTIORARI
	)	
v.	)	
	)	
WILLIAM N. FOXLEY,	)	Case No. _____
	)	
Defendant-Petitioner.	)	

* * * * * * * * *

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IN THE SUPREME COURT

STATE OF UTAH

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DEANNA FOXLEY,	)	
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* * * * * * * * *

QUESTIONS PRESENTED

I. Did the Utah Court of Appeals err in failing to effect the rule of law articulated by this court in Jones v. Jones, 700 P.2d 1072 (1985) and Ruhsam v. Ruhsam, 742 P.2d 123 (Utah App. 1987) wherein three factors must be considered and incorporated into Findings of Fact in awarding a party alimony?

II. Does the effect of the opinion of the Utah Court of Appeals relative to how the court should receive a Child Support Worksheet Schedule pursuant to §78-45-7, Utah Code Annotated (1953, as amended) put it in conflict with Rules 801(a) and (b), 802, 803, 901 and 902, Utah Rules of Evidence?

III. Did the Utah Court of Appeals err in failing to effect the rule of law articulated by this court in Delatore v. Delatore, 680 P.2d 27 (Utah 1984) wherein it did not reverse and strike attorney's fees awarded to plaintiff/appellee?

IV. Did the Utah Court of Appeals err in failing to grant defendant/appellant a new trial pursuant to Rule 59, Utah Rules of Civil Procedure?

OPINION OF THE UTAH COURT OF APPEALS

Defendant/husband petitions this court for review by a Writ of Certiorari of the decision and judgment of the Utah Court of Appeals. Foxley v. Foxley, Civil No. 890493-CA (Utah Ct. App. 1990); Exhibit "A" - Appendix.

The court affirmed the decision and implemented the order of Judge Richard Moffat holding that he did not abuse his discretion in modifying a Decree of Divorce raising alimony from $10.00 per month to $1,350.00 per month without termination date, awarding an increase of child support from $450.00 per month to $1,547.00 per month (3 children), denying defendant's post trial motions for a new trial and Motion to Dismiss. The court did reverse the award of attorney's fees and remand for a determination of their amount. Foxley, (supra).

JURISDICTION

Jurisdiction to review the opinion of the Court of Appeals entered in this matter December 3, 1990, is vested in the Utah Supreme Court pursuant to Utah Const. Art. VIII, §3; Utah Code Ann. §78-2-2(2) (1987); and R. Appellate Procedure 42, 43 & 45.

CONTROLLING AUTHORITY

The following provisions of Utah Code Ann. §30-3-1(1), §30-3-5(3), §78-45-7 (1989); Rules 801(a) and (b), 802, 803 and 902, Utah Rules of Evidence.

30-3-1(1). **Procedure - Residence - Grounds.**

(1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.

30-3-5(3). **Disposition of property - Maintenance and health care of parties and children - Court to have continuing jurisdiction - Custody and visitation - Termination of alimony - Nonmeritorious petition for modification.**

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

78-45-7. **Determination of amount of support - Rebuttable guidelines.**

(1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(2) If no prior court order exists, or a material change in circumstances has occurred, the court determining the amount of prospective support shall require each party to file a proposed

award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted. (Emphasis added).

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors including but not limited to:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the needs of the obligee, the obligor, and the child;

(f) the ages of the parties;

(g) the responsibility of the obligor for the support of others.

(4) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

(a) the amount of public assistance received by the obligee, if any; and

(b) the funds that have been reasonably and necessarily expended in support of spouse and children.

Rule 801, Utah Rules of Evidence. **Definitions.**

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

Rule 802, Utah Rules of Evidence. **Hearsay Rule.**

Hearsay is not admissible except as provided by law or by these rules.

Rule 803, Utah Rules of Evidence. **Hearsay exceptions; availability of declarant immaterial.**

See Exhibit "B" - Appendix.

Rule 901, Utah Rules of Evidence. **Requirement of authentication or identification.**

See Exhibit "B" - Appendix.

Rule 902, Utah Rules of Evidence. **Self-authentication.**

See Exhibit "B" - Appendix.

STATEMENT OF THE CASE

Appellant, former husband to Respondent (hereafter cited as "husband") petitions this court for review by a Writ of Certiorari, the opinion issued by the Utah Court of Appeals affirming all aspects of a modification of a Decree of Divorce except a reversal and remand of attorney's fees granted by Judge Richard Moffat, judge of the Third District Court.

The trial court entered an Order increasing alimony from $10.00 per month to $1,350.00 per month, increasing child support

from $450.00 per month to $1,547.00 per month and awarding wife $4,394.00 as and for attorney's fees.

The husband filed several post trial motions which were denied.

The husband then filed an appeal to the Court of Appeals and a subsequent Petition for Rehearing. The Court of Appeals affirmed all aspects of the modification granted by the trial court with the exception that it reversed the award of attorney's fees and remanded the matter back to the trial court for a determination of the amount of attorney's fees.

The husband petitions this court for review by Writ of Certiorari from that decision.

STATEMENT OF THE FACTS

The parties were married on October 8, 1976.

The marriage of the parties was terminated by Decree of Divorce entered on August 22, 1983.

In June, 1984, the husband requested a court order for the wife to appear and show cause why she should not be found in contempt of court for denying defendant visitation, wife filed a counterclaim asking for increase in child support, alimony and attorney's fees.

The conflicting positions of the parties came on for trial on September 22, 1988, which was continued to March 7, 1989, before the Honorable Richard Moffat presiding.

In this case, the wife submitted a Child Support Worksheet after her case was closed.

The Worksheet was submitted without foundation and without determining or deducting business expenses or insurance contributions. The Worksheet was received by Judge Moffat over objection by the husband who ruled that the Worksheet could be submitted at any time. See Exhibit "C" - Appendix (pg. 112, lines 13-25; pg. 113, lines 1-4).

A statement designated as attorney's fees was also submitted after her case was closed. The statement was submitted without foundation or testimony and was objected to by the husband. See Exhibit "D" - Appendix (pg. 113, lines 16-25; pg. 114, lines 1-25).

Ten days later a document dated March 16, 1989 titled "Supplement to Attorney's Fees of Robert Hughes" was submitted and received over the objection of husband. See Exhibit "E" - Appendix.

The trial court ordered child support increased from $450.00 per month (3 children) to $1,547.00 per month,increased alimony from $10.00 per month to $1,350.00 per month, ordered husband to provide health and dental insurance and awarded wife $4,394.00 in attorney's fees.

In May, 1989, the husband brought several post judgment motions including a Motion to Set Aside Verdict, Motion for New Trial, Objection to Findings of Fact/Conclusions of Law, Motion to Dismiss because of perjury of wife. These motions were denied on

August 7, 1989. See Exhibit "F" - Appendix. On August 21, 1989, the husband filed an Appeal with the Utah Court of Appeals. On October 12, 1990, the Utah Court of Appeals affirmed the trial court's decision except it reversed the award of attorney's fees and remanded it back to the trial court to determine an amount. On October 26, 1990, the husband filed a Request for Rehearing. This petition was denied on December 3, 1990.

ARGUMENT

I. THE UTAH COURT OF APPEALS ERRED IN FAILING TO EFFECT THE RULE OF LAW ARTICULATED BY THIS COURT IN JONES V. JONES, 700 P.2D 1072 (1985) AND RUHSAM V. RUHSAM, 742 P.2d 123 (Utah App. 1987), WHEREIN THREE FACTORS MUST BE CONSIDERED AND INCORPORATED INTO FINDINGS OF FACT IN AWARDING A PARTY ALIMONY.

This court should grant husband a review by Writ of Certiorari on the grounds that the ruling by the Court of Appeals is contrary to decisions of this court and other decisions of the Utah Court of Appeals.

This court ruled specifically in Jones v. Jones, 700 P.2d 1072 (1985) and the Utah Court of Appeals in Ruhsam v. Ruhsam, 742 P.2d 123 (Utah App. 1987), that there must be clear rationale for the level of alimony awarded to a party and that the court must consider three criteria in determining the level of alimony.

The trial court failed to specify anything in its findings nor was there any evidence offered that would let the court fashion a dollar amount rationally related to the needs of the wife so the

court could set the alimony amount at $1,350.00 per month. See Exhibit "G" - Appendix.

Under Jones (supra), the first prong of the three part test is that the court has to ascertain the financial conditions and needs of the wife. This necessarily has to be stated in terms of dollars and cents so that the court can assess the second prong as to whether the wife could produce enough income to meet her needs.

The Appellate Court held that test was met because the court found that "...Mrs. Foxley and the children had experienced some serious hardships and had been on public assistance even though Mrs. Foxley had done an admirable job in performing her responsibilities". Foxley, (supra). Exhibit "A" - Appendix.

Husband argues that under Jones, (supra), and Ruhsam, (supra), that the wife's needs specifically be expressed in terms of a dollars and cents finding so the court can rationally fashion an alimony level and further see if the husband can financially meet the level. It is reversible error not to make such specific findings. Acton v. Deliran, 737 P.2d 996 (Utah 1987).

II. THE EFFECT OF THE OPINION OF THE COURT OF APPEALS RELATIVE TO HOW THE COURT SHOULD RECEIVE A CHILD SUPPORT WORKSHEET PURSUANT TO §78-45-7, Utah Code Annotated (1953, as amended) PUTS IT IN CONFLICT WITH THE UTAH RULES OF EVIDENCE, RULES 801(a) AND (b), 802, 803, 901 and 902.

In this case, the wife submitted a Child Support Worksheet after the case was closed, without foundation and without deducting

business expenses or insurance contributions of the husband pursuant to §78-45-7 (1953, as amended).

Even though this section went into effect on April 24, 1989 after the trial on March 7, 1989, the court stated that by law he was required to accept the Worksheet (see Exhibit "C" - Appendix; pg. 112, lines 23-25) and its Finding No. 21 indicated that the child support amount would be set as "...reflected in the judicial districts support guidelines." See Exhibit "G" - Appendix.

The husband argued in his Brief to the Court of Appeals that the Child Support Worksheet was hearsay pursuant to Rule 801(a), 801(b), 802 and 803, Utah Rules of Evidence, was not admissible and not within any of the exceptions as provided by Rule 901 and 902. Further, the husband argued that the wife laid no foundation, but merely submitted it to the court after resting her case. See Exhibit "C" - Appendix.

The Court of Appeals did not address this issue in its written opinion.

The husband moved for a rehearing arguing the court had overlooked this issue and requested a ruling. The Court of Appeals denied the husband's request for a rehearing.

The husband does not argue the technicality that §78-45-7, Utah Code Annotated (1953, as amended), was not in effect at the time of trial because both parties submitted Worksheets.

The trial judge was under the impression that the Worksheet could be submitted at anytime and the court was required by law to

accept one. Such an approach puts §78-45-7(2), Utah Code Annotated (1953, as amended), in direct conflict with the Utah Rules of Evidence.

Section 78-45-7(2), Utah Code Annotated (1953, as amended), provides:

> (2) If no prior court order exists, or a material change in circumstances has occurred, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

The husband would argue that evidentiary safeguards should not be overlooked and that a modification of child support is a proceeding in divorce and should be conducted pursuant to the Rules of Evidence.

Section 30-3-1(1), Utah Code Annotated (1953, as amended), provides:

> (1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.

The failure of the Court of Appeals to make a ruling on this issue leaves the state of the law unclear.

III. THE UTAH COURT OF APPEALS ERRED IN NOT REVERSING THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES PURSUANT TO LAW AS ENUNCIATED BY THIS COURT IN DELATORE V. DELATORE, 680 P.2d 27 (1984).

At the end of trial, the wife made a proffer over the objection of the defendant of attorney's fees. See Exhibit "D" - Appendix (pg. 114, lines 7-25; pg. 115, lines 1-9).

The wife proffered that attorney's fees were $3,000.00. See Exhibit "D" - Appendix (pg. 115, lines 1-4).

This amount was admitted over objection of defendant.

Ten days after the trial counsel for husband received a 3-page document, dated March 16, 1989, entitled supplement to attorney's fees of Robert Hughes. See Exhibit "E" - Appendix.

The document was not in affidavit form and instead of $3,000.00 previous balance, showed a balance of $3,180.00.

The amount due on the bottom of the statement attachment was $4,394.25.

This is the figure that the court used in its award of attorney's fees without further hearing or evidence.

The Utah Court Appeals found that "...Mr. Foxley does not challenge Mrs. Foxley's need or entitlement to an award of attorney's fees and costs..." Foxley, (supra), Exhibit "A" - Appendix (pg. 5) and reversed the award and remanded it back to the trial court for a determination of amount only.

The law in Utah is that an award of attorney's fees must be based on evidence showing first that there is a financial need of

the person receiving the award and second that the award is reasonable. Gardner v. Gardner, 748 P.2d, 1076 (Utah 1988); Porco v. Porco, 752 P.2d (Utah App. 1988).

On page 39 of his Brief, the husband argued that the wife did not put on evidence of need for attorney's fees. This is contrary to the opinion of the Appellate Court that the husband did not challenge the need or entitlement of the wife to attorney's fees. The burden of proof of need and entitlement is on Respondent not Appellate. Mr. Foxley did challenge this fact in his Brief that Mrs. Foxley did not meet her burden of proof as to need as required by Utah case law. Delatore v. Delatore, 680 P.2d 27 (Utah 1984); Warner v. Warner, 655 P.2d 684, 688 (Utah 1982); Gardner v. Gardner, 748 P.2d 1076 (Utah 1988).

The husband made a motion for rehearing to the Utah Court of Appeals and requested the court to review his Brief because he had challenged this issue both at trial and in his Brief. The Court of Appeals denied the husband's motion.

Delatore, (supra), is factually similar to this case at bar.

There this court ordered that the award of attorney's fees should be stricken because the only reference in the record to attorney's fees were in opening and closing statements that they were requested.

This court pointed out the long list of precedent whereby the evidentiary requirement is testimony regarding the necessity of the number of hours dedicated, the reasonableness of the rate changed

in light of the difficulty of the case and the rates commonly charged in the community. The wife admits that there was no evidence, but argues the court took judicial notice of these facts. Clearly the Court of Appeals erred in not striking the award of attorney's fees.

Further, the Court of Appeals is not consistent in applying the standard.

In Talley v. Talley, 739 P.2d 83 (Utah App. 1987), the Utah Court of Appeals reversed an award of attorney's fees when the wife's counsel proffered testimony and produced an exhibit itemizing the time and costs expended and the hourly rates charged. The court reversed the award of attorney's fees because there was no evidence regarding the "...necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished, and the rates commonly charged for divorce action in the community...." The case at bar is factually the same. The Court of Appeals should have stricken the award of attorney's fees under Talley, (supra).

The husband seeks a Writ of Certiorari from this court to reverse and strike the award of attorney's fees.

IV. THE UTAH COURT OF APPEALS ERRED IN FAILING TO REMAND THIS MATTER BACK TO THE TRIAL COURT FOR A NEW TRIAL PURSUANT TO RULE 59, UTAH RULES OF CIVIL PROCEDURE.

Rule 59, Utah Rules of Civil Procedure, provides:

> (a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any

> of the parties and on all or part of the issues, for any of the following causes...
>
> > (1) Irregularity in the proceedings of the...adverse party...
> >
> > (4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial...
> >
> > (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law...."

The husband in a post judgment motion in District Court presented the court with affidavits by one Robert Farr that plaintiff had committed perjury at trial in at least the following particulars (Exhibit "H" - Appendix):

(1) Plaintiff in discovery and at trial represented that she had one bank account when she in fact had a secret bank account that she ran money through.

Defendant alleges that an attorney that plaintiff socialized with advised her not to disclose the existence of the account.

(2) Plaintiff in discovery and at the time of trial asked plaintiff to disclose her assets. Plaintiff failed to disclose that she had purchased an airplane having invested $4,500.00 in said asset.

Defendant claimed that this fact was material as plaintiff represented that she was in need of alimony.

(3) Plaintiff in discovery and in trial represented that her home was in substantial disrepair and that she did not have adequate funds to repair the same. After trial she submitted a bill to the underlying mortgage holder that she had expended $19,000.00 towards improvements on the home that she had testified she needed alimony to make. This perjury on its face.

Because of these accusations by the adverse party, the trial judge should have ordered an evidentiary hearing as requested by the husband or held plaintiff in contempt of court and ordered a new trial or dismissed plaintiff's petition.

Even assuming that defendant did not commit perjury, the above evidence would constitute new evidence not available at trial.

In defendant's motion for new trial based on the foregoing, defendant was asked why he could not have discovered that plaintiff had purchased an airplane for $4,500.00.

Defendant responded by indicating to the court that three (3) weeks after the trial, defendant's counsel was contacted by a person whom plaintiff was suing over the airplane.

Plaintiff's response is contained in the transcript and her counsel characterizes the airplane situation as "...a more thorny issue" (Exhibit "I" - Appendix (pg. 53, lines 7-8) and argues if there was error in failure to disclose it should be harmless error.

Defendant would emphatically emphasize that one of the major issues was the needs of the plaintiff. Certainly if the plaintiff

shelled out $4,500.00 for an airplane, $19,000.00 for home improvements, intentional failure to disclose these items is not harmless error.

The Utah Court of Appeals in its opinion made the following comments:

> "Mr. Foxley also moved for a new trial, pointing to evidence unearthed after trial concerning Ms. Foxley's assets. Ms. Foxley is said to have expended $4,500.00 toward the purchase of an airplane, as well as $19,000.00 for improvements on her home. She explains the airplane purchase as an investment of her modest savings from assets awarded to her at the end of her prior marriage. The enterprise in which she invested has proven worthless, and recovery of her funds through litigation is now contingent at best. Meanwhile, the extreme economic disparity between these parties remains.
>
> Mr. Foxley argues that Ms. Foxley's expenditure of $19,000.00 to repair her home belies her claim that she lacked assets to do so. Even if we assume that the fact of this alleged expenditure could not, with diligence, have been discovered in time for trial, it is not grounds for retrying the case. The $19,000.00 figure reported by Ms. Foxley to her mortgagee included a substantial amount representing value of labor she performed, and it remains entirely plausible that she may, despite her efforts, lack the money necessary to pay for needed materials and completed repairs exceeding her abilities. Moreover, the $19,000.00 of home repairs does not necessarily indicate that she and the children have additional assets or no additional needs, a circumstance which seems improbable, considering the low level of support Mr. Foxley has provided over the years.

The Court of Appeals includes in its opinion statement of facts as to the wife's expenditures that the husband has alleged as perjury and new evidence.

The husband at the trial level moved the court to hold an evidentiary hearing so that he could refute the wife's proffer that the Court of Appeals now accepts as proven facts. Instead, the trial court dismissed the husband's motion for evidentiary hearing and motion for new trial. The husband would argue that the wife's argument for an increase in alimony centers around her unsubstantiated needs in light of this proffer of evidence. The husband urges this court to grant his writ so that his claims can be argued in an evidentiary forum with his right to confront and cross-examine the wife.

CONCLUSION

The trial court in domestic matters has been granted considerable latitude in exercising its discretion and equitable powers to fashion remedies to provide for alimony and the maintenance and support of the children and parties under §30-3-5, Utah Code Annotated (1953, as amended) and the decisions of this court. The court has continuing jurisdiction under §30-3-5, Utah Code Annotated (1953, as amended) to make subsequent orders, as necessary, in keeping with public policy to protect the interest of the parties and children and to reduce the social and economic costs to the state as a result of divorce.

This court has ruled that to avoid challenge in awarding alimony, the trial court must consider three factors:

1. The financial condition and needs of the spouse claiming support;

2. Ability of that spouse to provide a sufficient income for herself;

3. Ability of the responding spouse to pay.

Jones, (supra).

The Utah Court of Appeals opinion erred in not reversing the trial court's judgments of alimony because the trial court failed to show a clear rationale for the level of alimony consistent with the criteria of Ruhsam, (supra).

The Rules of Evidence and evidentiary foundation should be required in all contested matters where a Child Support Worksheet is submitted. Because the wife did not properly lay a foundation and did not introduce evidence to support the amounts used in the Worksheet, the award of child support should be reversed.

The Appellate court erred in not reversing in total the award of attorney's fees and granting the husband a new trial or an evidentiary hearing.

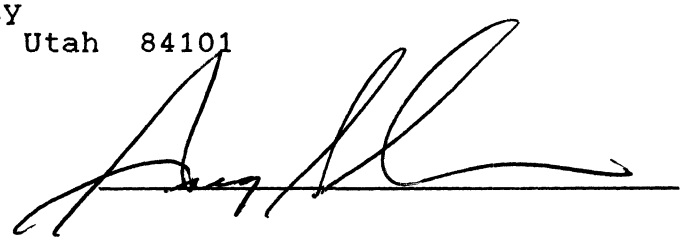
DATED this 30 day of December, 1990.

Greg S. Ericksen
Attorney for Defendant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of December, 1990, I mailed, postage prepaid, a true and correct copy of the foregoing to:

Robert W. Hughes
1000 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101



APPENDIX

COVER SHEET

CASE TITLE:

Deanna Foxley,
Plaintiff and Appellee,
v.
William M. Foxley,
Defendant and Appellant.

Case No. 890493-CA

PARTIES:

Greg S. Ericksen (Argued)
Attorney for Appellant
1065 So. 500 West
Bountiful, UT 84010

Robert W. Hughes (Argued)
Attorney for Respondent
1000 Valley Tower
50 West Broadway
Salt Lake City, UT 84101

TRIAL JUDGE:

Honorable Richard H. Moffat

Oct. 12, 1990. OPINION (For Publication)
This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed. We therefore reverse the award of attorney fees and costs and remand for a determination of their amount.
Opinion of the Court by ROBERT L. NEWEY, Senior Juvenile Court Judge, sitting by special appointment; REGNAL W. GARFF, and NORMAN H. JACKSON, Court of Appeals Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of November, 1990, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

Deputy Clerk

TRIAL COURT:

Salt Lake County Third District Court Case No. D82-1591

IN THE UTAH COURT OF APPEALS

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Deanna Foxley,	)	OPINION
	)	(For Publication)
Plaintiff and Appellee,	)	
	)	Case No. 890493-CA
v.	)	
	)	
William M. Foxley,	)	F I L E D
	)	October 12, 1990
Defendant and Appellant.	)	

Third District Court, Salt Lake County
The Honorable Richard H. Moffat

Attorneys: Greg S. Ericksen, Bountiful, Attorney for Appellant
Robert W. Hughes, Salt Lake City, Attorney for Appellee

Before Judges Garff, Jackson, and Newey.[1]

NEWEY, Judge:

Defendant William Foxley appeals from the modification of the decree divorcing him from plaintiff Deanna Foxley. We affirm.

The Foxleys were married in October, 1976, when Mr. Foxley was a graduate student and Ms. Foxley an undergraduate student. They separated in April 1982 and were divorced in August 1983, after Mr. Foxley had just graduated from medical school in June 1983. Mr. Foxley has since completed residency and developed a professional practice specializing in obstetrics and gynecology. In June 1984, Ms. Foxley received a bachelor's degree in sociology and has since continued her education.

During the marriage, three children were born to the Foxleys, and Mr. Foxley adopted a daughter from Ms. Foxley's

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1. Robert L. Newey, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp. 1990).

prior marriage. This daughter has reached the age of majority since the decree was entered in 1983. The decree awarded Ms. Foxley monthly child support of $150 per child and alimony of $10 per month, based in part on Mr. Foxley's meager income during medical school.

The decree was not formally modified until July 1989, when the district court increased alimony to $1,350 per month and child support to $546 per month per child. Mr. Foxley has appealed from that modification.

Substantial Change of Circumstances

The alimony award of the initial decree appears to have been based on Mr. Foxley's background as a medical student and the prospect of an increase in his income following graduation from medical school:

> [Ms. Foxley] is awarded an interest in [Mr. Foxley's] medical degree, and is awarded the sum of $10.00 per month as alimony, and . . . at such time as there has been a material change in circumstances of the parties, the issues of child support and/or alimony may be reviewed.

Clearly, the change in Mr. Foxley's income from the negligible earnings of an unemployed student to his earnings in recent years well in excess of $100,000 per year is a substantial change of circumstances justifying a modification of the 1983 decree. See Naylor v. Naylor, 700 P.2d 707, 710 (Utah 1985); Jense v. Jense, 784 P.2d 1249, 1251-52 (Utah Ct. App. 1989).

Mr. Foxley argues, however, that the premise for the trial court's modification was not the stated substantial change in circumstances, but rather in reality a revision of the original decree to include equitable restitution, which was not awarded in the original decree. Decisional law since the 1983 decree has held that a medical degree is not marital property, but instead has permitted equitable restitution to take into account a spouse's academic attainments in which the other spouse has assisted. See Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App. 1988), cert. granted, 765 P.2d 1277 (1988). However, the trial court in this case expressly declined to base this modification on the equitable restitution doctrine, and noted instead that a substantial change in circumstances

supported the modification. From the court's comments at the modification hearing, equitable restitution was apparently considered, but the trial court did not rest its decision on equitable restitution. The trial court may appropriately make its award based on a substantial change of circumstances with supporting findings, instead of choosing to base its decision on equitable restitution.

Amounts of Alimony and Child Support

If the trial court's findings and conclusions[2] show that the court considered the material factors,[3] we accord considerable discretion to the trial court in determining the amounts of alimony and child support.[4] In this case, the trial court found Mr. Foxley's income to be in the range between $120,000 and $224,000.[5] The court also found that Ms. Foxley and the children had experienced some serious hardships and had been on public assistance, even though Ms. Foxley had done "an admirable job" in performing her responsibilities. In light of these findings, the increases in alimony and child support are far from abuses of the trial court's discretion.

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2. Adequate findings and conclusions are required, see Acton v. Deliran, 737 P.2d 996 (Utah 1987); Stevens v. Stevens, 754 P.2d 952, 958 (Utah Ct. App. 1988); Jefferies v. Jefferies, 752 P.2d 909 (Utah Ct. App. 1988).

3. Regarding alimony, see Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). Regarding child support, see Utah Code Ann. § 78-45-7(2)(1987); see also Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985).

4. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986) (alimony); Proctor v. Proctor, 773 P.2d 1389 (Utah App. 1989) (child support).

5. Mr. Foxley asserts that the evidence is inadequate to support the finding on the amount of his income. However, in thus attacking the finding, Mr. Foxley has the burden to marshall all of the evidence in support of the finding and then demonstrate from it that the finding is clearly erroneous. Doelle v. Bradley, 784 P.2d 1176 (Utah 1989); Riche v. Riche, 784 P.2d 465 (Utah App. 1989). He has failed to do so, and the finding therefore stands.

We note that the requirement of marshalling the evidence is especially appropriate in this case, since Mr. Foxley complains about the lack of evidence under his control and concerning a fact that he is in the best position to know.

Post-Trial Motions

With little authority or analysis, Mr. Foxley argues that the trial court erred in denying his motions for a directed verdict and for a judgment notwithstanding the verdict. Those motions clearly have no place in this case. A verdict is the decision of a jury,[6] and in this case, there was no jury.

Mr. Foxley also moved for a new trial, pointing to evidence unearthed after trial concerning Ms. Foxley's assets. Ms. Foxley is said to have expended $4,500 toward the purchase of an airplane, as well as $19,000 for improvements on her home. She explains the airplane purchase as an investment of her modest savings from assets awarded to her at the end of her prior marriage. The enterprise in which she invested has proven worthless, and recovery of her funds through litigation is now contingent at best. Meanwhile, the extreme economic disparity between these parties remains.

Mr. Foxley argues that Ms. Foxley's expenditure of $19,000 to repair her home belies her claim that she lacked assets to do so. Even if we assume that the fact of this alleged expenditure could not, with diligence, have been discovered in time for trial, it is not grounds for retrying the case. The $19,000 figure reported by Ms. Foxley to her mortgagee included a substantial amount representing value of labor she performed, and it remains entirely plausible that she may, despite her efforts, lack the money necessary to pay for needed materials and completed repairs exceeding her abilities. Moreover, the $19,000 of home repairs does not necessarily indicate that she and the children have additional assets or no additional needs, a circumstance which seems improbable, considering the low level of support Mr. Foxley has provided over the years.

For newly discovered evidence to warrant a new trial, the evidence must have a probative weight sufficient to have a probable effect on the result. Gregerson v. Jensen, 617 P.2d 369, 372 (Utah 1980); see also Doty v. Town of Cedar Hills, 656 P.2d 993, 995 (Utah 1982). The evidence Mr. Foxley proffers does not have that degree of probative value, and the trial court thus did not abuse its discretion[7] in denying his motion for a new trial.

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6. Black's Law Dictionary 1398 (5th ed. 1979).

7. See Anderson v. Toone, 671 P.2d 170, 173 (Utah 1983) ("trial court has wide discretion to grant or deny a motion for a new trial"); Chournos v. D'Agnillo, 642 P.2d 710, 713 (Utah 1982).

Attorney Fees and Costs

Mr. Foxley does not challenge Ms. Foxley's need for or entitlement to an award of attorney fees and costs, but rather, he questions the evidentiary basis establishing the reasonableness of the amount awarded. Ms. Foxley proffered evidence of the amount of her attorney fees over Mr. Foxley's objection, and she later filed an unsworn statement concerning them. There is, however, no admissible evidence in the record to substantiate the reasonableness of amount awarded. Since Mr. Foxley objected to the lack of evidence, and thereby placed in issue the basis for determining fact of reasonableness, an evidentiary basis for the amount awarded needs to be established.[8] We therefore reverse the award of attorney fees and costs and remand for a determination of their amount.

The modification of the parties' divorce decree is affirmed in all other respects.[9]

Robert L. Newey, Judge

WE CONCUR:

Regnal W. Garff, Judge

Norman H. Jackson, Judge

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8. Haumont v. Haumont, 793 P.2d 421, 425 (Utah Ct. App. 1990); Asper v. Asper, 752 P.2d 365, 368 (Utah Ct. App. 1988).

9. There is no merit to the claim that the trial judge should have been disqualified for bias. See State v. Gardner, 789 P.2d 273, 278 (Utah 1989) (recusal required only where substantial rights of the party are shown to be affected); see also Onyeabor v. Pro Roofing, Inc., 787 P.2d 525, 527 (Utah Ct. App. 1990) (timely objection required to raise question of judicial bias); see generally Madsen v. Prudential Fed. Sav. & Loan, 767 P.2d 538 (Utah 1988).

IN THE UTAH COURT OF APPEALS

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Deanna Foxley, Plaintiff and Appellee, v. William M. Foxley, Defendant and Appellant.	)	ORDER DENYING PETITION FOR REHEARING Case No. 890493-CA

Before Judges Jackson, Garff, and Newey.

THIS MATTER having come before the Court upon Appellee's Petition for Rehearing, filed October 26, 1990,

IT IS HEREBY ORDERED that the Appellee's Petition for Rehearing is denied.

Dated this 30th day of November, 1990.

FOR THE COURT

Mary T. Noonan, Clerk

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of December, 1990, a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING was deposited in the United States mail to each of the following:

Robert W. Hughes
Attorney for Appellee
1000 Valley Tower
50 West Broadway
Salt Lake City, UT 84101

Greg S. Ericksen
Attorney for Appellant
1065 So. 500 West
Bountiful, UT 84010

DATED this 3rd day of December, 1990.

By _____
Deputy Clerk

Section	
30-3-10.2.	Joint legal custody order — Factors for court determination — Public assistance
30-3-10.3.	Terms of joint legal custody order.
30-3-10.4.	Modification or termination of order.
30-3-10.5.	Payments of support, maintenance, and alimony.
30-3-10.6.	Payment under child support order — Judgment
30-3-11.	Repealed.
30-3-11.1.	Family Court Act — Purpose.
30-3-11.2.	Appointment of counsel for child.
30-3-12.	Courts to exercise family counseling powers.
30-3-13.	Repealed.
30-3-13.1.	Establishment of family court division of district court.
30-3-14.	Repealed
30-3-14.1.	Designation of judges — Terms
30-3-15.	Repealed.
30-3-15.1.	Appointment of domestic relations counselors, family court commissioner, and assistants and clerks
30-3-15.2	Domestic relations counselors — Powers.
30-3-15.3.	Commissioners — Powers.
30-3-15.4.	Salaries and expenses.
30-3-16.	Repealed.
30-3-16.1.	Jurisdiction of family court division — Powers.
30-3-16.2.	Petition for conciliation.
30-3-16.3.	Contents of petition.
30-3-16.4.	Procedure upon filing of petition.
30-3-16.5.	Fees.
30-3-16.6.	Information not available to public.
30-3-16.7.	Effect of petition — Pendency of action.
30-3-17.	Power and jurisdiction of judge.
30-3-17.1.	Proceedings deemed confidential — Written evaluation by counselor.
30-3-18.	Waiting period for hearing after filing for divorce — Use of counseling service not to be construed as condonation.
30-3-19 to 30-3-22.	Repealed

30-3-1. Procedure — Residence — Grounds.

(1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.

(2) The court may decree a dissolution of the marriage contract between the plaintiff and defendant on the grounds specified in Subsection (3) in all cases where the plaintiff or defendant has been an actual and bona fide resident of this state and of the county where the action is brought, or if members of the armed forces of the United States who are not legal residents of this state, where the plaintiff has been stationed in this state under military orders, for three months next prior to the commencement of the action.

(3) Grounds for divorce:

(a) impotency of the defendant at the time of marriage;

(b) adultery committed by the defendant subsequent to marriage;

(c) willful desertion of the plaintiff by the defendant for more than one year;

(d) willful neglect of the defendant to provide for the plaintiff the common necessaries of life;

(e) habitual drunkenness of the defendant;

(f) conviction of the defendant for a felony;

(g) cruel treatment of the plaintiff by the defendant to the extent of causing bodily injury or great mental distress to the plaintiff;

(h) irreconcilable differences of the marriage;

(i) incurable insanity; or

(j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

(4) A decree of divorce granted under Subsection (3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children; and

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1.

Amendment Notes. — The 1985 amendment by Chapter 72 rewrote Subsection (1); added Subsection (2); designated two undesignated paragraphs as Subsections (3) and (4); inserted "In determining" and "the court" in Subsection (4); redesignated former Subsections (2) and (3) as Subsections (5) and (6); divided Subsection (5) into two sentences, substituting "However, if the remarriage" for "unless

NOTES TO DECISIONS

Cited in Jefferies v. Jefferies, 752 P.2d 909 (Utah Ct. App. 1988); Asper v. Asper, 753 P.2d 978 (Utah Ct. App. 1988).

78-45-3. Duty of man.

NOTES TO DECISIONS

Cited in Race v. Race, 740 P.2d 253 (Utah 1987).

78-45-7. Determination of amount of support — Rebuttable guidelines.

(1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(2) If no prior court order exists, or a material change in circumstances has occurred, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors including but not limited to:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the needs of the obligee, the obligor, and the child;

(f) the ages of the parties;

(g) the responsibility of the obligor for the support of others.

(4) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

(a) the amount of public assistance received by the obligee, if any; and

(b) the funds that have been reasonably and necessarily expended in support of spouse and children.

History: L. 1957, ch. 110, § 7; 1977, ch. 145, § 10; 1984, ch. 13, § 2; 1989, ch. 214, § 3.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, divided former Subsection (2) into present Subsections (2) and (3) by substituting the language beginning "require each party" at the end of Subsection (2) and the introductory language in Subsection (3) for "consider all relevant factors including but not limited to:"; rewrote Subsection (3)(e), which had read, "the need of the obligee"; substituted "ages" for "age" in Subsection (3)(f); redesignated former Subsection (3) as Subsection (4); deleted former Subsection (4), providing for the establishment and use of a uniform statewide assessment formula; and made minor stylistic changes.

Rule 706. Court-appointed experts.

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **Parties' experts of own selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Advisory Committee Note. — This rule is the federal rule, verbatim Rules 59-61 of the Uniform Rules of Evidence (1953), on which the Utah Rules of Evidence (1971) were patterned, provided for the appointment, compensation and handling of appointed expert witness testimony These rules were not adopted in the state of Utah The reason for the rejection is unknown However, the Utah Supreme Court has previously indicated that a trial judge has inherent authority to call a witness Merchants Bank v Goodfellow, 44 Utah 349, 140 P 759 (1914)

Cross-References. — Blood tests in actions to determine parentage, appointment of experts by court, §§ 78-25-18 to 78-25-23, 78-45a-7 to 78-45a-10

Criminal proceedings, court appointment of expert witnesses, § 77-35-15

COLLATERAL REFERENCES

A.L.R. — Right of independent expert to refuse to testify as to expert opinion, 50 A L.R.4th 680

ARTICLE VIII.

HEARSAY.

Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2)

nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if:

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony or the witness denies having made the statement or has forgotten, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Advisory Committee Note. — Subsection (a) is in accord with Rule 62(1), Utah Rules of Evidence (1971).

Subsection (b) is in accord with Rule 62(2), Utah Rules of Evidence (1971). The hearsay rule is not applicable in declarations of devices and machines, e.g., radar. The definition of "hearsay" in subdivision (c) is substantially the same as Rule 63, Utah Rules of Evidence (1971).

Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury. The former Utah rules admitted such statements as an exception to the hearsay rule. See California v. Green, 399 U.S. 149 (1970), with respect to confrontation problems under the Sixth Amendment to the United States Constitution. Subdivision (d)(1) is as originally promulgated by the United States Supreme Court with the addition of the language "or the witness denies having made the statement or has forgotten" and is in keeping with the prior Utah rule and the actual effect on most juries.

Subdivision (d)(1)(B) is in substance the same as Rule 63(1), Utah Rules of Evidence (1971). The Utah court has been liberal in its interpretation of the applicable rule in this general area. State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957).

Subdivision (d)(1)(C) comports with prior Utah case law. State v. Owens, 15 Utah 2d 123, 388 P.2d 797 (1964). State v. Vasquez, 22 Utah 2d 277, 451 P.2d 786 (1969).

The substance of subdivision (d)(2)(A) was contained in Rules 63(6) and (7), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Similar provisions to subdivisions (d)(2)(B) and (C) were contained in Rule 63(8), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Rule 63(9), Utah Rules of Evidence (1971), was of similar substance and scope to subdivision (d)(2)(D), except that Rule 63(9) required that the declarant be unavailable before such admissions are received. Adoptive and vicarious admissions have been recognized as admissible in criminal as well as civil cases. State v. Kerekes, 622 P.2d 1161 (Utah 1980).

Statements by a co-conspirator of a party made during the course and in furtherance of

ment of the victim's testimony was not hearsay State v Hutchison, 655 P 2d 635 (Utah 1982)

Prior inconsistent statement properly excluded See State v Heaps, 711 P 2d 257 (Utah 1985)

Cited in Zion's First Nat'l Bank v Fennemore 655 P 2d 1111 (Utah 1982) State v Jones, 656 P 2d 1012 (Utah 1982), State v Velasquez, 672 P 2d 1254 (Utah 1983), In re J L K , 728 P 2d 988 (Utah 1986); **State v.** Walker, 743 P 2d 191 (Utah 1987); **State ex rel.** State Dep't of Social Servs v Woods, 744 P 2d 315 (Utah Ct App 1987), Tripp v **Vaughn,** 747 P 2d 1051 (Utah Ct App 1987), **State** v Barber, 747 P 2d 436 (Utah Ct App 1987), Miller v Archer, 749 P 2d 1274 (Utah Ct App 1988), State v Thomas, 111 Utah Adv Rep 24 (1989)

COLLATERAL REFERENCES

Brigham Young Law Review. — The Hobgoblin of the Federal Rules of Evidence An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal, 1987 B Y U L Rev 231

Journal of Contemporary Law. — Comment Victims of Child Sexual Abuse in the Courtroom New Utah Rules and Their Constitutional Implications 15 J Contemp L 81 (1989)

Am. Jur. 2d. — 29 Am Jur 2d Evidence § 493 et seq

C.J.S. — 31A C J S Evidence § 192 et seq

A.L.R. — Admissibility of impeached witness' prior consistent statement—modern state criminal cases, 58 A L R 4th 1014

Key Numbers. — Evidence ⇐ 314 et seq

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law or by these rules

Advisory Committee Note. — This rule is Rule 802 of the Uniform Rules of Evidence (1974) and is the same as the first paragraph of Rule 63 Utah Rules of Evidence (1971)

Cross-References. — Affidavits taking and certification of § 78 26 5 et seq

Contemporaneous entries and writings of decedent as prima facie evidence, § 78 25-8

Judgment entry of, Rule 58A, U R C P

Judgment roll in criminal case contents and filing, § 77-35-22

Marriage certificate, issuance and filing, §§ 30-1-6, 30-1-12

Official records as evidence, § 78-25-3, Rule 44, U R C P

Recording conveyances, § 57-3-1 et seq

NOTES TO DECISIONS

ANALYSIS

In general
Chemical breath analysis
Purpose

In general.

Hearsay is generally not admissible on the ground that it lacks trustworthiness for two basic reasons (1) the person who purports to know the facts is not stating them under oath, (2) that person is not present for cross-examination State v Sibert 6 Utah 2d 198 310 P 2d 388 (1957)

Chemical breath analysis.

Section 41-6-44 3, governing the admission of chemical breath analysis, is a valid statutory exception to the hearsay rule Layton City v Bennett, 741 P 2d 965 (Utah Ct App 1987), cert denied, 765 P 2d 1277 (Utah 1988)

Purpose.

The hearsay rule has as its declared purpose the exclusion of evidence not subject to cross-examination concerning the truthfulness of the matters asserted State v Long, 721 P 2d 483 (Utah 1986)

COLLATERAL REFERENCES

Journal of Contemporary Law — Comment, Victims of Child Sexual Abuse in the Courtroom New Utah Rules and Their Constitutional Implications, 15 J Contemp L 81 (1989)

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive. design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately. shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted. the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A)

the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organization.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Advisory Committee Note. — This rule is the federal rule, verbatim. Subdivision (1) is comparable to Rule 63(4), Utah Rules of Evidence (1971).

Subdivision (2) is comparable to Rule 63(4)(b), Utah Rules of Evidence (1971). State v. McMillan, 588 P.2d 162 (Utah 1978).

Subdivision (3) is a similar provision to Rule 63(12), Utah Rules of Evidence (1971).

Subdivision (4) is comparable to Rule 63(12),

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A)

the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organization.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies. charts, engravings on rings, inscriptions on family portraits. engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility

(23) **Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Advisory Committee Note. — This rule is the federal rule, verbatim. Subdivision (1) is comparable to Rule 63(4), Utah Rules of Evidence (1971).

Subdivision (2) is comparable to Rule 63(4)(b), Utah Rules of Evidence (1971). State v. McMillan, 588 P.2d 162 (Utah 1978).

Subdivision (3) is a similar provision to Rule 63(12), Utah Rules of Evidence (1971).

Subdivision (4) is comparable to Rule 63(12),

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Advisory Committee Note. — This rule is the federal rule, verbatim. Rule 65, Utah Rules of Evidence (1971), contained a comparable provision.

COLLATERAL REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence §§ 254, 267 et seq.

C.J.S. — 31A C.J.S. Evidence § 190.
Key Numbers. — Evidence ⇐ 155.

ARTICLE IX.

AUTHENTICATION AND IDENTIFICATION.

Rule 901. Requirement of authentication or identification.

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

(2) **Nonexpert opinion on handwriting.** Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conservations, by evidence that a call was made to the number assigned at the time by the telephone

company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by court rule or statute of this state.

Advisory Committee Note. — Subdivision (b)(2) is in accord with State v Freshwater 30 Utah 442, 85 Pac 447 (1906) Subdivision (b)(8) is comparable with Rule 67 Utah Rules of Evidence (1971), except that the former rule imposed a 30-year requirement Subdivision (b)(10) is an adaptation of subdivision (10) in the comparable federal rules to conform to state practice

Cross-References. — Official record, authentication of copy, Rule 44(a), U R C P

Writings, manner of proof, § 78-25-9

NOTES TO DECISIONS

Analysis

Nonexpert opinion on handwriting
Photographs
Public records or reports

Nonexpert opinion on handwriting.

Writing may be proved by evidence of a witness who has seen the person write, even if the witness has seen him write only once and then only his name The proof in such case may be very light, but the jury will be permitted to weigh it State v Freshwater, 30 Utah 442, 85 P 447 (1906) (referred to in Committee Note)

Photographs.

In general, if a competent witness with personal knowledge of the facts represented by a photograph testifies that the photograph accurately reflects those facts, it is admissible, and any minor discrepancies in the testimony which go only to the details of the time and place the picture was taken are not material to the purpose for which the evidence is introduced and they do not undermine the adequacy of the foundation for admissibility of the photographs State v Purcell, 711 P 2d 243 (Utah 1985)

Public records or reports.

No Utah statute recognizes the certifying signature of a notary public, without more, as a proper means of authenticating an official document as evidence State v Lamorie, 610 P.2d 342 (Utah 1980)

Copies of county court records, certified by a duly authorized notary public who had no custody of the documents, official or unofficial, and who was not a deputy of the court clerk the court clerk being the official custodian of the documents, did not constitute adequate authentication State v Lamorie, 610 P 2d 342 (Utah 1980).

COLLATERAL REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 849 et seq.

C.J.S. — 32 C.J.S. Evidence § 733 et seq.; 32A C.J.S. Evidence § 743 et seq.

A.L.R. — Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 A.L.R.3d 1018.

Public records kept or stored on electronic computing equipment, 71 A.L.R.3d 232.

Construction and effect of § 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness, 72 A.L.R.3d 1243.

Key Numbers. — Evidence ⇐ 366 et seq.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in Paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by court rule, statute, or as provided in the constitution of this state.

Advisory Committee Note. — Subdivision (1) is comparable to Rule 68, Utah Rules of Evidence (1971).

Subdivision (2) is comparable to Rule 68(3), Utah Rules of Evidence (1971).

Subdivision (10) is Rule 902(10), Uniform Rules of Evidence (1974).

This subdivision [sic] does not supersede Rule 44, Utah Rules of Civil Procedure, which defines the form of certification.

Cross-References. — Proof of official record, Rule 44, U.R.C.P.

NOTES TO DECISIONS

Foreign public documents.

Copies of Colorado court records, certified by notary public who had no custody, official or unofficial, of the documents, were lacking sufficient authentication to permit their receipt into evidence to establish that one charged with unlawful possession of dangerous weapon was on parole for felony. State v. Lamorie, 610 P.2d 342 (Utah 1980)

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Advisory Committee Note. — This rule is the federal rule, verbatim. Statutory provisions concerning authentication of documents, such as, e.g., Title 78 Chapter 25, Utah Code Annotated (1953), are unchanged by this rule.

Cross-References. — Proof of writing, § 78-25-9 et seq.

ARTICLE X.

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) **Writings and recordings.** "Writings" and "recordings" consist of

NOTES TO DECISIONS

ANALYSIS

Nonexpert opinion on handwriting.
Photographs.
Public records or reports.

Nonexpert opinion on handwriting.

Writing may be proved by evidence of a witness who has seen the person write, even if the witness has seen him write only once and then only his name. The proof in such case may be very light, but the jury will be permitted to weigh it. State v. Freshwater, 30 Utah 442, 85 P. 447 (1906) (referred to in Committee Note).

Photographs.

In general, if a competent witness with personal knowledge of the facts represented by a photograph testifies that the photograph accurately reflects those facts, it is admissible, and any minor discrepancies in the testimony which go only to the details of the time and place the picture was taken are not material to the purpose for which the evidence is introduced and they do not undermine the adequacy of the foundation for admissibility of the photographs. State v. Purcell, 711 P.2d 243 (Utah 1985).

Public records or reports.

No Utah statute recognizes the certifying signature of a notary public, without more, as a proper means of authenticating an official document as evidence. State v. Lamorie, 610 P.2d 342 (Utah 1980).

Copies of county court records, certified by a duly authorized notary public who had no custody of the documents, official or unofficial, and who was not a deputy of the court clerk, the court clerk being the official custodian of the documents, did not constitute adequate authentication. State v. Lamorie, 610 P.2d 342 (Utah 1980).

COLLATERAL REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 849 et seq.

C.J.S. — 32 C.J.S. Evidence § 733 et seq.; 32A C.J.S. Evidence § 743 et seq.

A.L.R. — Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 A.L.R.3d 1018.

Public records kept or stored on electronic computing equipment, 71 A.L.R.3d 232.

Construction and effect of § 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness, 72 A.L.R.3d 1243.

Key Numbers. — Evidence ⇐ 366 et seq.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal.** A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in Paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents.** A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by court rule, statute, or as provided in the constitution of this state.

Advisory Committee Note. — Subdivision (1) is comparable to Rule 68, Utah Rules of Evidence (1971).

Subdivision (2) is comparable to Rule 68(3), Utah Rules of Evidence (1971).

Subdivision (10) is Rule 902(10), Uniform Rules of Evidence (1974).

This subdivision [sic] does not supersede Rule 44, Utah Rules of Civil Procedure, which defines the form of certification.

Cross-References. — Proof of official record, Rule 44, U.R.C.P.

COPY (TR2)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

DEANNA FOXLEY,

Plaintiff,

vs.

WILLIAM FOXLEY,

Defendant.

Case No. D 82 1591

REPORTER'S TRANSCRIPT

* * *

This cause came on to be heard before the HONORABLE RICHARD H. MOFFAT, one of the Judges of the said Court, on the 7th day of March, 1989, when and where the following proceedings were had.

* * *

A P P E A R A N C E S

For the Plaintiff: MR. ROBERT W. HUGHES
Attorney at Law
50 West Third South, #1000
Salt Lake City, Utah

For the Defendant: MR. GREG S. ERICKSEN
Attorney at Law
1065 South 500 West
Bountiful, Utah 84010

HAL M. WALTON
Registered Professional Reporter

MR. ERICKSEN: Nothing further from this witness, your Honor.

THE COURT: You may step down, Dr. Foxley.

MR. ERICKSEN: The only final thing I have so far as I know, we've only had one submission of attorney's fees by Mr. Dyer. I would make a proffer, if your Honor wishes, and be called to the witness stand to testify as to my own and some of those attorney's fees and what went on in contradiction and rebuttal to his testimony.

THE COURT: Phil Dyer?

MR. HUGHES: He was the first witness.

THE COURT: Yeah.

MR. HUGHES: And in the interest of time, first, I would object because he cross-examined Mr. Dyer as to those. But I don't object to a proffer. I also have a schedule of support based upon the guidelines. I didn't introduce it, but it's something that I had provided, however, in December, to Mr. Ericksen. I would ask to have that admitted along with all of the other exhibits.

MR. ERICKSEN: Object at this point. He closed his case.

MR. HUGHES: Probably true.

THE COURT: Well, I suppose under the rules, he can file those guideline worksheets any time you want to, so go ahead.

MR. HUGHES: I was going to say just file it.

THE COURT: Yeah. Doesn't really make that much difference. Okay. What do you want to do about attorney's fees with Dyer?

MR. ERICKSEN: Just going to make a proffer that Mr. Dyer ran up an extraordinary amount of attorney's fees. And part of those attorney's fees were incurred because of the procedural mistakes by prior counsel. Part of the attorney's fees were made trying to get me disqualified as the attorney, which I don't think had any basis and were frivolous. They should never have been brought. I would like the Court to consider that in rebuttal to his testimony.

THE COURT: Okay. Too much has been spent on the attorney's fees and not enough been spent on the kids. That's one of the problems, so where do we go from here?

MR. HUGHES: Two things, your Honor. Mr. Ericksen or Mr. Dyer was cross-examined on that issue. And if the Court would like, that's on Page 7 and 8 of the transcript. Also, there were my attorney's fees, and I would like to put that in the record.

THE COURT: You may.

MR. HUGHES: Just as a matter of proffer. Do you want me sworn in?

MR. ERICKSEN: I object to that.

MR. HUGHES. Why would you object?

Robert W. Hughes (1573)
Attorney for Plaintiff
1000 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone (801) 534-1074

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY,
Plaintiff

vs.

WILLIAM M. FOXLEY,
Defendant.

CHILD SUPPORT OBLIGATION WORKSHEET (SOLE CUSTODY)

Civil No. _____

AVAILABLE INCOME		Plaintiff	Defendant	Combined
Gross Monthly Income		1a 791.00	1b 6969.25	
Pre-Existing Alimony or Child Support Orders You Have Paid		2a 0	2b 0	
Adjusted Gross Income (1a-2a=3a, 1b-2b=3b, 3a+3b=3c)		3a 791.00	3b 6969.25	3c 7760.25
Proportionate Share of Combined Income (3a-3c=4a, 3b-3c-4b)		4a 10 %	4b 90 %	
CHILD SUPPORT NEED				
Age Group		0-6	7-15	16-18
Number of Children per Age Group (5a+5b+5c=5d)		5a 1	5b 2	5c 0 — 5d 3
Schedule Amount per Child (use the combined adjusted gross income from 3c and the schedule appropriate to the total number of children in 5d)		6a 504	6b 607	6c 0
Total Amount (5ax6a=7a, 5bx6b=7b, 5cx6c=7c, 7a+7b+7c=7d)		7a 504	7b 1214	7c 0 — 7d 1718
Work-Related Child Care Costs				8 0
Health and Dental Insurance Premiums for Children				9
Total Support Need (7d+8+9=10)				10 1718
CHILD SUPPORT OBLIGATION Share of Obligation (4ax10=11a, 4bx10=11b)			11a 171	11b 1547
Credit for Actual Payments in 8 and 9			12a 0	12b 0
Parent's Total Child Support Obligation (11a-12a=13a, 11b-12b=13b)			13a 171	13b 1547

The extended visitation amount applies only to the non-custodial parent and to those months in which the order specifies that the child spend at least 25 of 30 consecutive days with that parent.

Amount Paid During Extended Visitation (13ax.75=14a, 13bx.75=14b)	14a 128.25	14b 1160-25	

COPY

(TR2)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

DEANNA FOXLEY,

Plaintiff,

vs.

WILLIAM FOXLEY,

Defendant.

Case No. D 82 1591

REPORTER'S TRANSCRIPT

* * *

This cause came on to be heard before the HONORABLE RICHARD H. MOFFAT, one of the Judges of the said Court, on the 7th day of March, 1989, when and where the following proceedings were had.

* * *

APPEARANCES

For the Plaintiff: MR. ROBERT W. HUGHES
Attorney at Law
50 West Third South, #1000
Salt Lake City, Utah

For the Defendant: MR. GREG S. ERICKSEN
Attorney at Law
1065 South 500 West
Bountiful, Utah 84010

HAL H. WALTON
Registered Professional Reporter

MR. HUGHES: I was going to say just file it.

THE COURT: Yeah. Doesn't really make that much difference. Okay. What do you want to do about attorney's fees with Dyer?

MR. ERICKSEN: Just going to make a proffer that Mr. Dyer ran up an extraordinary amount of attorney's fees. And part of those attorney's fees were incurred because of the procedural mistakes by prior counsel. Part of the attorney's fees were made trying to get me disqualified as the attorney, which I don't think had any basis and were frivolous. They should never have been brought. I would like the Court to consider that in rebuttal to his testimony.

THE COURT: Okay. Too much has been spent on the attorney's fees and not enough been spent on the kids. That's one of the problems, so where do we go from here?

MR. HUGHES: Two things, your Honor. Mr. Ericksen or Mr. Dyer was cross-examined on that issue. And if the Court would like, that's on Page 7 and 8 of the transcript. Also, there were my attorney's fees, and I would like to put that in the record.

THE COURT: You may.

MR. HUGHES: Just as a matter of proffer. Do you want me sworn in?

MR. ERICKSEN: I object to that.

MR. HUGHES. Why would you object?

MR. ERICKSEN: Your case is closed.

MR. HUGHES: YOu and I agreed we would put on my attorney's fees, in chambers this morning. That would be the last thing we did. I said I would do it by proffer.

MR. ERICKSEN: I said I have no objections if you did it during your case.

MR. HUGHES: Move to proffer my attorney's fees, your Honor.

THE COURT: You may go ahead.

MR. HUGHES: Your Honor, let me have these marked, if I could, please. Two documents I would submit to the Court. Exhibits No. 16 and 17. Exhibit No. 16 would be the monthly statements that I sent to the plaintiff for services rendered and would show an amount due presently, including payments which she has made, of $3,180. Exhibit No. 17 was an affidavit that I prepared and filed with the Court for our first hearing, one of our first hearings on this matter, indicating my attorney's fees for $1,965 up until February. The Court, if it reviews this, will notice that from about 1987 up until February, it showed that Deanna Foxley had a credit and that there were no services provided during that time. The problem was that we had changed billings at that time and those were not represented on the new computer bills that we entered into. For ease of the Court, I would waive my initial attorney's fees

in this matter, the $1,900, and submit my attorney's fees would be as indicated in Plaintiff's Exhibit No. 16 and total $3,000. I would have to include the payments as indicated made to me by the plaintiff.

I would move for the admission of Plaintiff's Exhibit Nos. 16 and 17.

THE COURT: Over objection?

MR. ERICKSEN: Over objection.

THE COURT: Will be received.

You gentlemen want summary?

MR. ERICKSEN: Like a closing, yes.

THE COURT: We'll take a ten-minute break so Hal can rest his fingers. We'll come back and listen to closing.

(Whereupon, the recess was taken.)

THE COURT: You may proceed.

MR. ERICKSEN: First address child support, your Honor. The Uniform Child Support guidelines overview requires that worksheets must be completed in accordance with instructions contained therein and submitted to the Court with supporting financial certification. The problem that I have got with Mr. Hughes' offer of his schedule is number one, there was no foundation for it, and number two, no ability to cross-examine by the defendant, number three, it was submitted after he closed his case, and number four,

Robert W. Hughes (1573)
Attorney for Plaintiff
1000 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 534-1074

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY, Plaintiff, vs. WILLIAM M. FOXLEY, Defendant.	SUPPLEMENT TO ATTORNEYS FEES OF ROBERT W. HUGHES Civil No: D82-1591 Judge Richard H. Moffat

Attached hereto is a copy of the attorneys' fees incurred by Robert W. Hughes through the date of trial. This submission is to supplement the exhibit of attorneys' fees submitted at trial.

DATED this 16th day of March, 1989.

Robert W. Hughes

W1-FOX-SA1

Robert W. Hughes
Attorney at Law
1000 Valley Tower, 50 West Broadway
Salt Lake City, Utah 84101-2006
(801) 534-1074

DeAnna Foxley
735 Wall Street
Salt Lake City, Utah 84102

BILLING DATE 03-13-89
HD-RWH-32
ACC'T NO. RWH87DM-816-1

:VIOUS BALANCE				$3,180.00
'E	PROFESSIONAL SERVICES RENDERED	INDIV	TIME	
·28-89	Conference with client(s).	RWH	1.10	$66.00
·02-89	Preparation for hearing.	RWH	1.00	$60.00
·02-89	Preparation of Response to Motion.	RWH	0.60	$36.00
·05-89	Preparation of Response to Motion.	RWH	2.60	$156.00
·05-89	Preparation for hearing.	RWH	2.80	$168.00
·06-89	Conference with client(s).	RWH	1.20	$72.00
·06-89	Preparation for hearing.	RWH	4.80	$288.00
·06-89	Telephone conf. with opposing attorney.	RWH	0.20	$12.00
·07-89	Preparation for hearing.	RWH	1.20	$72.00
·07-89	Court appearance for hearing.	RWH	5.40	$324.00
·07-89	Conference with client(s).	RWH	0.80	$48.00
'AL FOR THE ABOVE SERVICES			21.70	$1,302.00
'E	EXPENSES			
·07-89	Transcript Cost.		$62.25	
'AL FOR THE ABOVE EXPENSES				$62.25
			TOTAL	$4,544.25
	PAYMENT RECEIVED 02-27-89		$150.00	
	TOTAL PAYMENTS			$150.00
			AMOUNT DUE	$4,394.25

Prompt payment is appreciated.
Make check payable to Robert W. Hughes.
*** THANK YOU ***

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of March, 1989, a true and correct copy of the foregoing SUPPLEMENT TO ATTORNEYS FEES OF ROBERT W. HUGHES was mailed, first-class postage thereon prepaid, to Greg S. Ericksen, 1065 South 300 East, Bountiful, Utah 84010.

Robert W. Hughes

GREG S. ERICKSEN - 1002
Attorney for Defendant
1065 South 500 West
Bountiful, Ut 84010
Telephone:(801)295-6841

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY, Plaintiff, vs. WILLIAM M. FOXLEY, Defendant.	OBJECTION TO ATTORNEY'S FEES OF ROBERT W. HUGHES CIVIL NO. D82-1591 JUDGE RICHARD H. MOFFAT

COMES NOW Greg S. Ericksen, counsel for Defendant who objects to Supplement to Attorney's fees of Robert W. Hughes based on the following:

Counsel for Plaintiff Robert W. Hughes did not submit his attorney's fees during trial of this matter, and submits evidence of attorney's fees after the case has been heard and argued.

DATED this 21 day of March, 1989.

GREG S. ERICKSEN
Counsel for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of March, 1989, a true and correct copy of the foregoing Objection was mailed via first class mail, postage pre-paid thereon to Robert W. Hughes at the following address: 1000 Valley Tower, 50 West Broadway, Salt Lake City, Utah 84101.

Mary Hallman
MARY HALLMAN

MISC:Foxley

GREG S. ERICKSEN - 1002
Attorney for Defendant
1065 South 500 West
Bountiful, Ut 84010
Telephone:(801)295-6841

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY, Plaintiff, vs. WILLIAM M. FOXLEY, Defendant.	ORDER CIVIL NO. D82-1591 JUDGE RICHARD H. MOFFAT

THIS MATTER came on for hearing on 1st day of June, 1989, at the hour of 2:00 p.m. before the honorable Richard Moffatt, Judge of the above-entitled Court, sitting without jury on various motions by the parties including:

-Defendant's Objection to Findings of Fact/Conclusions of Law, Order, entered by this court on April 19, 1989;

-Defendant's Motion for Judgment Notwithstanding the Verdict;

-Defendant's Motion for New Trial;

-Defendant's Motion to Extend Time for Filing Affidavits

-Defendant's Motion to Find Plaintiff in Contempt of Court for Perjury.

Plaintiff was present and represented by counsel, Robert W. Hughes, Defendant was not personally presnt but was represented by counsel, Greg S. Ericksen.

The Court having reviewed the file and the Motions, and having heard argument of Counsel and being advised in the premises, now enters the following Order:

IT IS HEREBY ORDERED

1. That Defendant's Objection to portions of the Findings of Fact/Conclusions of Law are hereby granted in part and ordered to be amended in the following particulars:

FINDINGS OF FACT NO. 2

"At the time of their marriage the defendant did not own any real property, had no savings, had few household furnishings and owned a pick up truck which he sold shortly after the marriage."

Ordered deleted.

FINDINGS OF FACT NO. 3

"At the time of the marriage, the plaintiff owned no real property, had approximately $8,900.00 in savings, owned two automobiles and had substantial household furnishings and appliances."

Ordered deleted.

FINDINGS OF FACT NO. 4

"In 1977 the parties moved from Boise, Idaho, to Saltello, Mexico, so that the defendant could attend medical school."

Ordered deleted.

FINDINGS OF FACT NO. 5

"The defendant attended several medical schools in Mexico. In 1980 the parties relocated to Salt Lake City, Utah, so that the defendant could attend the University of Utah Medical

School."

Ordered deleted.

FINDINGS OF FACT NO. 8

"During the marriage, the plaintiff was employed as a school teacher in Mexico, at a Savings and Loan, and at a grocery store. The defendant was also employed at various times during the marriage."

Ordered deleted.

FINDINGS OF FACT NO. 10

"During the marriage, the parties depleted the plaintiff's pre-marriage savings and used the vehicles and other personal property which the plaintiff had acquired prior to the marriage."

Ordered deleted.

FINDINGS OF FACT NO. 33

"The Court finds that at the time of the modification hearing, there has been a substantial change in circumstances of the parties, that the plaintiff has a real and substantial need for an increase in alimony and that she has endured substantial and significant personal hardships both during the marriage and since the time of the divorce."

Ordered changed to

The Court finds that at the time of the modification hearing, there has been a substantial change in circumstances of the parties, that the plaintiff has a real and substantial need for an increase in alimony and that she has endured substantial and significant hardships since the time of the divorce.

2. That the following additions to Findings of Fact/Conclusions of Law are hereby approved and incorporated into Findings of Fact/Conclusions of Law.

A. A finding of plaintiff's financial condition and income at the time of the decree.

(1) A finding of plaintiff's expenses at the time of the decree at about a thousand seventy ($1,070.00).

(2) A finding that the plaintiff is currently living in the same home she was living in at the time the decree was entered.

(3) A finding of how much the plaintiff is currently earning.

3. Defendant's Motion for Judgement Notwithstanding the Verdict be and hereby is denied.

4. Defendant's Motion for New Trial be and hereby is denied.

5. Defendant's Motion to Extend Time to File further Affidavits In Support of Defendant's Motion for New Trial based on newly discovered evidence be and hereby is denied.

6. Defendant's Motion to Find Plaintiff in Contempt of Court for Perjury be and hereby is denied.

7. Defendant's Motion to Strike Plaintiff's Attorney's Fees from the order entered on April 19, 1989 be and hereby is denied.

SO ORDERED.

DATED this 7 day of August, 1989.

BY THE COURT

DISTRICT COURT JUDGE

APPROVED AS TO FORM:

Robert W. Hughes
Attorney for Plaintiff

Greg S. Ericksen
Attorney for Defendant

MISC:Foxley

ROBERT W HUGHES (1573)
Attorney for Plaintiff
1000 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801)534-1074

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY, Plaintiff, vs. WILLIAM N. FOXLEY, Defendant.	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW CIVIL NO. D82-1591 JUDGE RICHARD H MOFFAT

THIS MATTER came on for trial on September 22, 1988, at the hour of 2:00 p.m. and was subsequently continued to March 7, 1989 at the hour of 10:00 a.m. on Plaintiff's Petition to Modify a Decree of Divorce before the Honorable Richard H. Moffatt, Judge of the above-entitled Court, sitting without jury. The Plaintiff, Deanna Foxley, was represented by Robert W Hughes and the Defendant, William N. Foxley, was represented by Greg S. Ericksen.

The Court having heard testimony and received evidence, argument to the Court having been made, and the Court being fully advised in the premises is now prepared to enter its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff and the Defendant were married October 8,

1976. At the time of the marriage, the Plaintiff was an undergraduate student and the Defendant was a graduate student at Boise State University.

2. The divorce trial was heard on June 30, 1983, a Decree of Divorce was signed on August 22, 1983 and entered on August 23, 1983 to become final three months from the time of entry.

3. At the time of the divorce, the Plaintiff was unemployed and had no income and the Defendant was a student and had an income, not including amounts received from student loans, of approximately $50.00 per month.

4. That at the time of the divorce, the Plaintiff had expenses of $1,070.00 per month, the Defendant had expenses of $895.00 per month.

5. The Defendant graduated from the University of Utah Medical School in June of 1983.

6. During the parties marriage the parties had four minor children to wit: Christine, born September 19, 1970. (Christine was the daughter of the Plaintiff by a prior marriage who was adopted by the Defendant in October of 1980.); Sarah, born May 23, 1977; Noall, born July 13, 1979; and Corinne, born April 15, 1982.

7. During the marriage, the Plaintiff could not pursue her formal education due to frequent relocations of the Defendant in pursuing his medical career, because Plaintiff was employed at

various times during the marriage to assist in the support of the family, and due to the fact that Plaintiff was pregnant for a major portion of the time.

The parties acquired few household furnishings, appliances or other personal property during the marriage.

8. For approximately the two years after the parties were divorced, the Plaintiff and the parties minor children required and received public assistance.

9. The Court finds that the Plaintiff has done an admirable job of caring for and educating the parties minor children.

10. The Court finds that the Plaintiff and the minor children have endured substantial hardships since the time of the divorce.

11. The Court finds that the Plaintiff has made significant personal sacrifices to further her education since the time of the divorce. After the divorce, Plaintiff obtained her bachelors degree in Sociology and expects to receive her masters degree in 1989. Plaintiff anticipates pursuing a Ph.D. Length of time for completion of this course of study will depend on course requirements.

12. The Plaintiff intends to continue with her education in an effort to maximize her income potential. The testimony and evidence admitted at trial indicates that the prospects of the Plaintiff finding well-paid and full-time employment in her field will be difficult without additional education and that even with

additional education, employment opportunities are projected to be limited in the future.

13. During the year 1987, the Plaintiff worked as a part-time employee and had a gross income of $9,600.00.

14. In 1987, the Defendant moved to Winslow, Arizona where he is the only medical doctor who specializes in obstetrics and gynecology in that vicinity.

15. During the year 1987, the last year which the Defendant was able to provide a tax return, the Defendant had a gross income of $128,437.00. The Defendant's 1987 income was comprised of wages he received $16,031.00 as an employee, for approximately 6 months, at the Huerly Medical Center in Michigan, and from the private practice of medicine. The Defendant earned $112,406.00 from his private medical practice in approximately 6 months of practice.

16. The earnings of the Defendant as well as his future potential have been considered by the court for the purpose of determining whether the amount of alimony should be modified.

17. The Defendant's present income is not completely clear but the Court finds based upon the evidence that his gross income can be interpreted as being as high as $224,000.00 a year but certainly under no circumstances less than approximately $120,000.00 per year.

18. The Defendant was able to contribute $41,660.00 to a Keogh Retirement Plan in 1987 and he anticipated contributing a similar amount to a retirement plan in 1988.

19. The Court finds that there has been a substantial change of circumstances in the parties income since the time of the divorce.

20. Based upon the changes of circumstances, a modification of the decree of divorce is warranted. The Court does not, however, find it necessary to invoke the theory of "Equitable Restitution" as annunciated by the Utah Courts of Appeals nor is it necessary to the Court to invoke the provisions of the original divorce decree, wherein Judge Condor awarded an interest in the Defendant's medical degree to the Plaintiff, since the change of circumstances and the needs of the Plaintiff and the minor children are sufficient to justify a modification of the decree.

21. Based upon the change of circumstances and the needs of the children, child support to be paid by the Defendant should be increased to the appropriate amount reflected in the judicial district's support guidelines.

22. The Court finds that the Plaintiff has an adjusted gross part-time income of $800.00 per month and that the Defendant has an adjusted gross income, after the subtractions of his minimum necessary expenses, in excess of $6,985.00 per month.

23. The proportionate share of the parties combined income is 10% and 90% for the Plaintiff and the Defendant respectively.

24. The Court finds that based upon the Plaintiff's and Defendant's combined adjusted gross incomes, the amount of child support per child should be the sum of $607.00 per month for the

minor children Sarah and Noall and should be the amount of $504.00 for the parties youngest child, Corinne, for a total child support amount of $1,718.00, monthly, for all three minor children. The Defendant, pursuant to the support guidelines, should pay to the Plaintiff the sum of $1,549.00 for child support. The Court further finds that the amount of child support for Corinne should increase to the sum of $607.00 per month beginning on April 15, 1989, since she will be 7 years of age on that date. Therefore, beginning on April 15, 1989, the Defendant's child support obligation will increase to $1,638.00 per month, $546.00 per month per minor child.

25. The Court further finds that pursuant to the support guidelines, the child support to be paid by the Defendant to the Plaintiff should be decreased by 25% during those periods which the Defendant has extended visitation of 25 consecutive or more days with the minor child(ren).

26. The Court finds that at the time of the hearing the Plaintiff was in arrears in property taxes for her residence in excess of $3,000.00 and that the Plaintiff's residence was in jeopardy of being sold by the county for back property taxes; that the Plaintiff is nine payments behind on her mortgage payments; that the Plaintiff has incurred substantial debts for medical, dental and orthodontic expenses for the children; that the home where the Plaintiff and the minor children reside is in poor condition and is in need of substantial and major repairs, including repairs to the roof, foundation, interior and exterior

walls and plumbing, rebuilding of the back entry into the home, as well as other repairs; and, that the Plaintiff and the children are in need of new appliances and household furnishings, including beds, furniture, a washer and dryer, a stove and ~~also~~ new clothing and shoes.

The Plaintiff is currently living in the same home as when the Decree was entered.

27. The Court finds that at the time of the modification hearing, there has been a substantial change in circumstances of the parties, that the Plaintiff has a real and substantial need for an increase in alimony and that she has endured substantial and significant personal hardships since the time of the divorce.

28. The Court finds that it is just and equitable that the monthly alimony to be paid by the Defendant to the Plaintiff should be increased from $10.00 to the sum of $1,350.00 per month. Payment of alimony to commence as of April 19, 1989.

29. The Court further finds that the Defendant should be required to provide health and dental insurance for the minor children of the parties. The Court further finds that it is equitable and just that any medical or dental expenses, including orthodontic expenses, not paid by health and dental insurance should be divided equally between the parties.

30. The Court finds that attorney's fees should be awarded to the Plaintiff in this case and that a reasonable attorney's fees would be the sum of $4,394.00 plus her costs incurred herein.

31. The Court finds that that the Plaintiff's Counsel's fees were charged at the rate of $60.00 per hour, and considering the length of time expended and the complexities of the issues, the above award of attorney's fees is reasonable.

32. That the Court did not consider whether alimony should be terminated but would entertain further hearing upon application of either party or future petitions for modification.

CONCLUSIONS OF LAW

1. There has been a substantial change of circumstances since the Decree of Divorce was originally entered in this matter.

2. It is fair and reasonable, based upon the change of circumstances, that the amount of child support to be paid by the Defendant should be increased in accordance with the schedules set forth in the child support guidelines.

3. The child support to be paid by the Defendant to the Plaintiff for support of the parties minor children should increase to the amount of $1,549.00 per month for the three minor children. The amount of child support to be paid by the Defendant to the Plaintiff for the support of the parties minor children should be increased to the amount of $1,638.00 per month, $546.00 per child per month, beginning April 15, 1989.

4. The Plaintiff has endured and continues to endure significant and substantial hardships and has made significant and substantial sacrifices since the time of the divorce and she

has a significant and substantial need at present and in the future for an increase in alimony.

5. It is fair and reasonable that the amount of alimony payable from the Defendant to the Plaintiff be increased to $1,350.00 per month, commencing April 19, 1989.

6. The Defendant should provide health, accident and dental insurance for the parties minor children and any medical and dental costs, including orthodontic treatments, which are not paid by medical insurance shall be divided equally between the parties.

7. It is just and reasonable that the Plaintiff be awarded attorney's fees in the amount of $4,394.00 plus costs incurred herein.

DATED this 6th day of July, 1989.

BY THE COURT

RICHARD H. MOFFAT
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

Robert W. Hughes
Attorney for Plaintiff

Greg S. Ericksen
Attorney for Defendant

MISC:Foxley

GREG S. ERICKSEN - 1002
Attorney for Defendant
1065 South 500 West
Bountiful, Ut 84010
Telephone:(801)295-6841

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY, Plaintiff, vs. WILLIAM M. FOXLEY, Defendant.	AFFIDAVIT OF ROBERT FARR CIVIL NO. D82-1591 JUDGE RICHARD H. MOFFAT

STATE OF UTAH)
: ss.
COUNTY OF DAVIS)

COMES NOW Robert Farr, who being duly placed under oath deposes and says as follows:

1. That on about March, 1985, I became acquainted with one Deanna Foxley.

2. During the course of 3 years from March, 1985 to about July, 1988, I saw her socially.

3. That during the period that I knew her, she informed me that she was involved in a court action with her ex-husband, Bill Foxley.

4. That during the course of our involvement she confided the following information to me.

A. That she had to appear as if she was destitute in order to get a big settlement from her ex-husband.

B. She told me that she had turned down job offers that would have paid her $40,000.00 per year until after the court case with Bill Foxley was completed.

C. She told me that she borrowed money for her education to make it appear that she was rehabilitating herself.

D. She told me that she kept her work hours to a minimum so it would appear that she earned very little.

E. She told me that she would not disclose the fact that she had other income from other jobs to Bill's attorney.

F. She told me that her attorney advised her to open a secret bank account that would not disclose all of her money that she had or earned.

She told me that she would not tell Bill's attorney about the bank account but that it would be kept secret.

The bank account was kept at Utah Bank & Trust under the name of Deanna Foxley and her daughter Kristine Foxley.

G. That she obtained copies of cases from her attorney so she could read them.

5. That in April, 1989 I contacted Greg S. Ericksen with this information.

DATED this _____ day of May, 1989.

ROBERT S. FARR

STATE OF UTAH)
: SS.
COUNTY OF DAVIS)

The undersigned being a Notary Public does hereby certify that on this _____ day of May, 1989, personally appeared before me, Robert Farr, who executed the foregoing Affidavit.

NOTARY PUBLIC
Residing at:_____

My commission expires:

_____

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of May, 1989 a true and correct copy of the foregoing Affidavit was mailed via first-class mail, postage pre-paid thereon to Robert W. Hughes at: 1000 Valley Tower, 50 West Broadway, Salt Lake City, Utah 84101.

MARY PETERSEN

MISC:Foxley-F.aff

COPY

TK's

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

DEANNA FOXLEY,

Plaintiff,

vs.

WILLIAM FOXLEY,

Defendant.

Case No. D 82 1591

REPORTER'S TRANSCRIPT

* * *

This cause came on to be heard before the HONORABLE RICHARD H. MOFFAT, one of the Judges of the said Court, on the 1st day of June, 1989, when and where the following proceedings were had.

* * *

A P P E A R A N C E S

For the Plaintiff: MR. ROBERT W. HUGHES
Attorney at Law
50 West Third South, #1000
Salt Lake City, Utah

For the Defendant: MR. GREG S. ERICKSEN
Attorney at Law
1065 South 500 West
Bountiful, Utah 84010

HAL M. WALTON
Registered Professional Reporter

him. We provided to him the information that he requested and Mr. Ericksen did not make a motion to compel, or pursue a motion to compel. We both filed them because we gave them what he asked for.

And the fact is, your Honor, if there was error, it was a harmless error. That second secret account, the old account simply had no money really going through it with regard to that, and this, I admit is a more thorny issue. And that regards the airplane. [Mr. Ericksen did ask, do you have an interest in any business and my client said no. And did anybody owe you any money. My client put just, I think, Dr. Foxley.

But I think there's some background that's very important for the Court to understand what happened, how this whole transaction came about. Mr. Farr, as we indicated in our affidavit, was an acquaintance, and more than an acquaintance of Deanna Foxley. Mr. Farr in fact asked him--asked her to marry him on several occasions. While they were dating, Mr. Farr said why don't you give me some money and we'll have this airplane. We'll be able to rent it and we'll make a lot of money. This is a small airplane and can be used--

MR. ERICKSEN: Objection, your Honor. This is again going in to testimony.

THE COURT: Well, that's hearsay as well.